

HEALTH AND SENIOR SERVICES

DIVISION OF HEALTH CARE SYSTEMS ANALYSIS

General Licensure Procedures and Enforcement of Licensure Regulations

Use of Mandatory Overtime for Certain Hourly Wage Employees Involved in Direct Patient Care Activities or Clinical Services

Reproposed Amendment: N.J.A.C. 8:43E-3.4

Reproposed New Rules: N.J.A.C. 8:43E-8

Authorized By: Clifton R. Lacy, M.D., Commissioner, Department of Health and Senior Services (with the approval of the Health Care Administration Board).

Authority: N.J.S.A. 26:2H-1, et seq., specifically 26:2H-5, and 34:11-56(a)31 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2003-378

Submit written comments by November 14, 2003 to:

John A. Calabria, Director

Certificate of Need and Acute Care Licensure Program

New Jersey Department of Health and Senior Services

P.O. Box 360

Trenton, New Jersey 08625-0360

The agency proposal follows:

Summary

Reproposed herein are a new rule and amendments to N.J.A.C. 8:43E, rules governing the enforcement of licensure provisions applicable to all licensed health care facilities. The reproposal corrects three provisions erroneously included or omitted in the proposed new rules, published in the New Jersey Register on August 4, 2003 (35 NJR 3509(a)). The published text failed to reflect the text approved by the Health Care Administration Board. This reproposal is intended to supersede and replace the August 4th proposed amendment and new rules. All comments received in response to the August 4th proposal and this reproposal will be summarized in the notice of adoption of the reproposal.

Specifically, the reproposal adds language to N.J.A.C. 8:43E-8.2(a)6, to clarify that the exemption for employees participating in a surgical or therapeutic procedures does not apply to an employee when an elective procedure is scheduled such that the time required to complete it will ordinarily exceed the employee's regular daily work shift. In addition, the reproposal deletes language at N.J.A.C. 8:43E-8.2(a)7 that identifies specific health care disciplines that are exempt from the rules, so that the final language closely tracks the statutory language.

In N.J.A.C. 8:43E-8.3, the definition of "chronic short staffing" is modified to reflect the final definition that was agreed to by a representative group of interested parties and the affected State agencies, and which should have been substituted for the language that inadvertently appeared in the August 4th proposal. The definition of this term is essential to the application of exceptions to the general prohibition on mandatory overtime. It provides a means of operationalizing a term used but not defined in the statute.

In the August 4, 2003 proposal, which was a draft erroneously published with the wrong definition, this term was characterized by the percentage of positions that were unfilled, whereas the reproposal distinguishes “chronic short staffing” as a situation marked by the length of time hospitals have been unable to fill vacancies despite active recruitment efforts.

N.J.A.C. 8:43E expired on April 3, 2000 and was adopted as new rules on February 20, 2001, with several new sections to clarify certain provisions and update the civil monetary penalties commensurate with P.L. 1998, c. 43, (codified as N.J.S.A. 26:2H-14). The reproposed new rules add a new subchapter, N.J.A.C. 8:43E-8, which establishes the standards and procedures governing the use of mandatory overtime by healthcare facilities for certain hourly wage employees involved in direct patient care activities or clinical services in all health care facilities. The reproposed amendment adds enforcement remedy language for noncompliance with the new rules contained in N.J.A.C. 8:43E-8.

This chapter applies to all long term care facilities, residential health care facilities, hospitals, comprehensive rehabilitation hospitals, ambulatory care facilities, residential drug and alcohol treatment facilities, adult day health care facilities, assisted living residences, comprehensive personal care homes, home health agencies, hospice care agencies and maternal and child health consortia. All of these services are the subject of licensure rules codified in the New Jersey Administrative Code, which sets forth minimum licensure requirements designed to promote the general health, safety and welfare of patients by ensuring that all licensed health care providers meet accepted standards of quality. If those standards are breached, N.J.A.C. 8:43E outlines the type of enforcement actions and the amounts of monetary penalties which may be applied by the Department,

in accordance with N.J.S.A. 26:2H-1 et seq. In addition, the mandatory overtime provisions proposed at N.J.A.C. 8:43E-8, also apply to State and county psychiatric hospitals, State developmental centers and health care service firms registered by the Division of Consumer Affairs in the Department of Law and Public Safety.

The repropoed amendment to N.J.A.C. 8:43E-3.4(a) and the new rules at N.J.A.C. 8:43E-8 can be summarized as follows:

N.J.A.C. 8:43E-3.4(a)3 corrects the names of the Department of Health and Senior Services' licensing programs that are responsible for monitoring compliance with the rules contained in this chapter.

N.J.A.C. 8:43E-3.4(a)4 corrects the name of the State Department program (that is, Department of Community Affairs) that is responsible for the review and approval of health care facility construction plans. Language has been added that establishes the effective date of a penalty. This language provides clarity regarding the liability of the facility and consistency of applications in penalty enforcement action.

N.J.A.C. 8:43E-3.4(a)13 establishes the civil monetary penalty for noncompliance with the mandatory overtime provisions proposed at N.J.A.C. 8:43E-8.

N.J.A.C. 8:43E-8.1 establishes the scope and purpose of the mandatory overtime procedures that are described in the subchapter and indicates all the facility types which are subject to the provisions of the subchapter.

N.J.A.C. 8:43E-8.2 specifies the applicability of the rules. N.J.A.C. 8:43E-8.2(a)1 through 7 specifies the employee categories to which the rules do not apply: physicians, volunteers, employees who volunteer to work overtime, employees of assisted living facilities licensed in accordance with N.J.A.C. 8:36, and who receive room and board as a

benefit of employment and reside at the facility on a full-time basis, employees who assume on-call duty, employees participating in a surgical or therapeutic interventional procedure that is in progress when it would be detrimental to the patient or resident if the employee left (although they would apply in certain elective procedures, if the procedure was scheduled such that the length of time ordinarily required to complete the procedure would exceed the end of the employee's scheduled shift), and employees not involved in direct patient care activities or clinical services.

N.J.A.C. 8:43E-8.3 sets forth definitions of the key terms used in this subchapter, which are designed to promote clarity and reduce confusion in the application of the terms throughout the subchapter. These terms include "chronic short staffing", "direct patient care activities," "employee," "employer," "health care facility," "licenses," "on-call time," "reasonable efforts" and "unforeseeable emergent circumstance." The definitions set forth in the sections promote consistency and uniformity in the application of the regulations among all facility types which are subject to the provisions of the subchapter.

N.J.A.C. 8:43E-8.4 describes the purpose of the rules, which is to promote the health, safety, and welfare of patients, residents and clients of health care facilities and certain hourly wage employees of the latter through the establishment of rules and regulations implementing statutory limitations on the ability of facilities to require overtime work by certain hourly wage employees involved in direct patient care activities or clinical services.

N.J.A.C. 8:43E-8.5 describes various overtime procedures. N.J.A.C. 8:43E-8.5(a) prohibits an employer from requiring an employee involved in direct patient care activities or clinical services to work in excess of an agreed to, predetermined and regularly

scheduled daily work shift, not to exceed 40 hours per week. The subsection indicates that the acceptance by any employee of work in excess of this shall be strictly voluntary and that the refusal by an employee to accept overtime work shall not be grounds for discrimination, dismissal, discharge, or any other penalty or employment decision adverse to the employee.

N.J.A.C. 8:43E-8.5(b) indicates that subsection (a) does not apply in the case of an unforeseeable emergent circumstance. Paragraph (b)1 requires that in such circumstances overtime is required only as a last resort and is not to be used to fill vacancies resulting from chronic short staffing; and paragraph (b)2 requires that the employer has exhausted reasonable efforts to obtain staffing. This subsection also states that the exhaustion of reasonable efforts is not required in the event of any declared national, State or municipal emergency or a disaster or other catastrophic event which substantially affects or increases the need for health care services or causes the facility to activate its emergency or disaster plan.

N.J.A.C. 8:43E-8.5(c) requires that in the event an employer requires an employee to work overtime pursuant to subsection (b), the employer shall provide the employee with necessary time, up to a maximum of one hour which may be taken on or off the facility's premises, to arrange for the care of the employee's minor children, or elderly or disabled family members. N.J.A.C. 8:43E-8.5(d) states that on-call time shall not be construed to permit an employer to use on-call time as a substitute for mandatory overtime.

N.J.A.C. 8:43E-8.6 describes requirements for recordkeeping and dissemination of information. N.J.A.C. 8:43E-8.6(a) requires an employer to establish a system for keeping records of circumstances where employees are required to work in excess of an agreed to,

predetermined and regularly scheduled daily work shift, or in excess of 40 hours per week. The records shall include, but not be limited to: employee's name and job title; name of the employee's work area or unit; date the overtime was worked, including start time; number of hours of overtime mandated; employee's daily work schedule for any week in which the employee is required to work excess time; reason why the overtime was necessary; description of the reasonable efforts that were exhausted prior to requiring overtime, including the names of employees contacted to work voluntary overtime; a description of efforts to secure per diem staff, and a list of the temporary agencies contacted; and the signature of the individual authorizing the required mandatory overtime.

N.J.A.C. 8:43E-8.6(b) requires the employer to provide the employee with a copy of the documentation required in subsection (a) upon requiring the employee to work overtime, except that the total number, rather than the names, of employees contacted shall be provided. N.J.A.C. 8:43E-8.6(c) requires that the records required by subsection (a) are kept for a period of two years. N.J.A.C. 8:43E-8.6(d) requires facilities to post in a conspicuous place, a notice prepared by the New Jersey Department of Labor concerning New Jersey Mandatory Overtime Restrictions for Health Care Facilities (N.J.S.A. 34:11–56a et seq.).

N.J.A.C. 8:43E-8.7 describes enforcement procedures and administrative penalties for violations of the regulations. N.J.A.C. 8:43E-8.7(a) permits the Commissioner of Labor to issue sanctions in accordance with the Wage and Hour regulations at N.J.A.C. 12:56 whenever that Commissioner determines that a facility has violated provisions of this subchapter.

N.J.A.C. 8:43E-8.7(b) states that in cases where the State agency that licenses the facility and/or the Department of Labor requests additional information from a facility concerning mandatory overtime usage, the facility shall comply with the request within 10 working days. However, the State agency that requested the information may, at its discretion, grant an extension to this timeframe if the facility can demonstrate good cause. Failure to provide these records shall result in the issuance of administrative penalties.

N.J.A.C. 8:43E-8.7(c) states that if the State agency that licenses a facility subject to this chapter determines through a survey or complaint investigation that the facility exhibits a pattern or practice of noncompliance with N.J.A.C. 8:43E-8.5, that State agency shall notify the Department of Labor of the violation. The Department of Labor may also share with state agencies that license facilities subject to this chapter any information it develops on Statewide or facility-specific trends, such as number of mandatory overtime complaints filed, the number of complaints found valid, the number of enforcement actions appealed and the number of enforcement actions upheld.

N.J.A.C. 8:43E-8.7(d) requires the Department of Health and Senior Services to take enforcement action if a licensed facility fails to develop and implement the record keeping required in N.J.A.C. 8:43E-8.6 and the policies and procedures required in N.J.A.C. 8:43E-8.8.

N.J.A.C. 8:43E-8.7(e) states that nothing in this chapter shall be construed to relieve a facility of its obligation to comply with State licensure standards pertaining to minimum employee staffing levels.

N.J.A.C. 8:43E-8.8 describes the policies and procedures required of facilities regarding employee overtime. N.J.A.C. 8:43E-8.8(a) requires facilities to develop and

implement policies and procedures for the purpose of training and educating staff on mandatory overtime. These policies and procedures shall include mandatory educational programs that address at least the conditions under which any employer can require mandatory overtime; overtime procedures; employee rights; and complaint procedures.

N.J.A.C. 8:43E-8.8(b) requires a facility to establish a staffing plan designed to facilitate compliance with the requirements of this chapter. The staffing plan shall include procedures to provide for replacement staff in the event of sickness, vacations, vacancies or other employee absences. N.J.A.C. 8:43E-8.8(c) requires the facility to make available the staffing plan and all related policies and procedures upon request of the Department of Labor and for the state agency that licenses the facility.

N.J.A.C. 8:43E-8.9 prohibits an employer from discharging or in any other manner discriminating against an employee because such employee has made a complaint to his or her employer, including the employer's representative; to the Commissioner of Labor; or to the State agency that licenses the facility where the employee works that the employee has been required to work overtime in contravention to the provisions of this chapter.

N.J.A.C. 8:43E-8.10 describes the complaint system to be used by an employee when that employee believes he or she has been required to work overtime in violation of this subchapter. N.J.A.C. 8:43E-8.10(a) grants an employee covered by this subchapter the right to file a complaint up to two years following the date of the assigned mandatory overtime if he or she believes the overtime was not in response to an unforeseen emergent circumstance, and/or required reasonable efforts were not exhausted, and/or he or she was not provided the allowed time to make arrangements for the care of family members. All such complaints shall be filed with the Division of Wage And Hour

Compliance of Labor Standards and Safety Enforcement of the New Jersey Department of Labor.

N.J.A.C. 8:43E-8.10(a)1 requires the complaint to be submitted on a form to be developed by the Department of Labor and available on its website. N.J.A.C. 8:43E-8.10(a)2 requires the records of reports submitted in accordance with paragraph (a)1 to be made available to the Department and/or the Department of Law and Public Safety or Department of Human Services, as applicable, upon request.

N.J.A.C. 8:43E-8.11 protects the right to collective bargaining. It states that nothing in the rules shall be construed to impair or negate any employer-employee collective bargaining agreement or any other employer / employee contract in effect as of January 1, 2003 for licensed general hospitals and July 1, 2003 for all other facilities.

N.J.A.C. 8:43E-8.12 describes data submission requirements. It requires that a facility shall submit data related to the effects of prohibiting mandatory overtime and data required to determine whether chronic staffing shortages exist, as the State agency which licenses the facility shall request.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

These rules are being promulgated to implement the requirements found in N.J.S.A. 34:11-56a et seq. which prohibit health care facilities (as defined in statute and the proposed rules) from requiring mandatory overtime from certain employees involved in direct patient care activities or clinical services. The statute directed the Department of

Health and Senior Services to work with the Department of Labor, the Department of Human Services and the Department of Law and Public Safety in the development of these rules. The Department has done so and, additionally, has consulted with representatives of both employee and employer groups.

The proposed rules are expected to have a positive social impact upon the health, safety and welfare of patients, residents and employees of the State's healthcare facilities. By prohibiting facilities from requiring employees to work overtime, except in unforeseen emergent circumstances, the rules should prevent situations in which employees are working under conditions of extreme fatigue and are therefore more likely to commit medical errors. At the same time, patients and residents will also have the added protection in that the proposed rules explicitly state that nothing therein shall be construed to relieve a facility of its obligation to comply with minimum staffing requirements contained in State licensure standards.

Economic Impact

The Department believes the rules will have a neutral economic impact, particularly in the long run as all interested parties adjust to the mandatory overtime prohibition. The prohibition on mandatory overtime will lead to an enhanced working environment, encouraging more individuals to enter the various clinical professions and others to stay in the profession for a longer period of time. In turn, this should stabilize staffing costs, with a positive economic impact on facilities and payers.

It should be noted that there is some concern that, in the short run, given the tight labor market for trained clinical personnel, the ban on mandatory overtime will result in "bidding wars" among facilities for existing personnel, increasing overall healthcare costs.

It should also be noted that the statute requires the Departments of Labor, Human Services and Health and Senior Services to collect data from all health care facilities regarding "the potential impact of the mandatory overtime prohibition on employee availability and other considerations" and jointly report findings to legislature. This requirement is also reflected in the rules which require that a facility submit data related to the effects of prohibiting mandatory overtime, as the State agency which licenses the facility shall request from time to time. This information will provide the Legislature a sound basis on which to determine if there is a need to amend the law.

The amendment proposed at N.J.A.C. 8:43E-3.4(a)13 regarding monetary penalties for violations of Subchapter 8 is consistent with that for violations of other licensure requirements and will not impose an undue burden on any facility. Clearly, penalty consequences are necessary to ensure effective implementation and enforcement of the rules.

Federal Standards Statement

There are no Federal standards governing mandatory overtime in health care facilities. Therefore, a Federal standards analysis is not required.

Jobs Impact

The repropoed new rules and amendments to this chapter are anticipated to increase the number of jobs available in licensed health care facilities over the long term.

Agriculture Industry Impact

The repropoed amendments and new rules will have no impact on the agricultural industry in New Jersey.

Regulatory Flexibility Analysis

The facilities covered by the reproposed amendments and new rules range from small to large, with many employing less than 100 people and many employing substantially more. Approximately 2,000 small businesses will be affected by these amendments and rules. However, the statute on which the rules are based does not differentiate among facilities by size. Additionally, the intent of the statute and rules cannot be achieved unless all facilities are subject to the same requirements, including recordkeeping requirements. The Summary above describes the many reporting, recordkeeping and compliance requirements. There will not be any capital costs associated with the proposed amendments and new rule, and no professional services will be needed to comply.

Smart Growth Impact

The reproposed amendments and new rules will not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Full text of the reproposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

8:43E-3.4 Civil monetary penalties

(a) Pursuant to N.J.S.A. 26:2H-13 and 14, the Commissioner may assess a penalty for violation of licensure regulations in accordance with the following standards:

1. – 2. (No change.)

3. For failure to obtain prior approval from the [Licensing Program, Division of Health Facilities Evaluation and Licensing] **Inspections, Compliance and Complaints Program or the Long Term Care Assessment and Survey Program, as applicable,** for occupancy of an area or initiation of a service following construction or application for licensure, \$250.00 a day;

4. For construction or renovation of a facility without the [Department's] **Department of Community Affairs'** approval of construction plans, \$1,000 per room or area renovated and immediate suspension of use in the room or area **from the date of initial use until determined by the Department to be in compliance with licensure standards. This determination shall take into account any waivers granted by the Department.**

5. – 10. (No change.)

11. For failure to report information to the Department as required by statute or licensing regulation, after reasonable notice and an opportunity to cure the violation, \$250.00 per day; [or]

12. For failure to implement a Certificate of Need condition of approval, \$1,000 per day, which shall be assessed either from the date specified in the Certificate of Need for implementation of the specific condition of approval, if identified, or from the date on which the Certificate of Need was considered to be implemented[.]; **or**

13. For violations of regulations governing the prohibition of mandatory overtime contained in N.J.A.C. 8:43E-8, \$1,000 per violation, which may be assessed for each day noncompliance is found.

(b) - (c) (No change.)

SUBCHAPTERS 6. and 7. (RESERVED)

SUBCHAPTER 8. MANDATORY OVERTIME

8:43E-8.1 Mandatory overtime; scope and general purpose

The procedures set forth in this subchapter apply to all health care facilities licensed in accordance with N.J.S.A. 26:2H-1 et seq., including a State or county psychiatric hospital, a State developmental center, or a health care service firm registered by the Division of Consumer Affairs in the Department of Law and Public Safety pursuant to N.J.S.A. 56:8-1.1 et seq. The rules set forth the standards and procedures governing the use by health care facilities of required overtime by hourly wage employees involved in direct patient care activities or clinical services in health care facilities.

8:43E-8.2 Applicability

(a) The rules in this subchapter do not apply to the following:

1. Physicians;
2. Volunteers;
3. Employees who volunteer to work overtime;
4. Employees of assisted living facilities that are licensed in accordance with N.J.A.C. 8:36 and who receive room and board as a benefit of employment and reside at the facility on a full-time basis;

5. Employees who assume on-call duty;

6. Employees participating in a surgical or therapeutic interventional procedure that is in progress, when it would be detrimental to the patient if the employee left. However, in the case of elective procedures, the rules do apply if the procedure was scheduled such that the length of time ordinarily required to complete the procedure would exceed the end of the employee's scheduled shift; and

7. Employees not involved in direct patient care activities or clinical services.

8:43E-8.3 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the content clearly indicates otherwise.

"Chronic short staffing" means a situation characterized by long standing vacancies in that portion of the facility's master staffing plan applicable to the work unit of an employee who files a complaint where such vacancies are the result of open positions that continually remain unfilled over a period of 90 days or more despite active recruitment efforts.

"Commissioner" means the Commissioner of Health and Senior Services.

"Department" means the New Jersey Department of Health and Senior Services.

"Direct patient care activities or clinical services" means activities/services in which an employee provides direct service to patients/residents in a clinical setting, including the emergency department, inpatient bedside, operating room, other

clinical specialty treatment area, or, in the case of a patient served by a home health care agency or health service firm, the individual's home.

"Employee" means an individual employed by a health care facility who is involved in direct patient care activities or clinical services and receives an hourly wage, but shall not include a physician.

"Employer" means an individual, partnership, association, corporation or person or group of persons acting directly or indirectly in the interest of a health care facility.

"Health care facility" means a health care facility licensed by the Department of Health and Senior Services pursuant to P.L. 1971, c.136 (N.J.S.A. 26:2H-1 et seq.), a State or county psychiatric hospital, a State developmental center, or a health care service firm registered by the Division of Consumer Affairs in the Department of Law and Public Safety pursuant to P.L. 1960, c.39 (N.J.S.A. 56:8-1 et seq.).

"Licenses" means the action taken by a State agency to license, certify, or register a health care facility subject to the jurisdiction of that State agency.

"On-call time" means time spent by an employee who is not currently working on the premises of the place of employment, but who is compensated for availability, or as a condition of employment has agreed to be available, to return to the premises of the place of employment on short notice if the need arises.

"Reasonable efforts" means that the employer shall:

1. Seek persons who volunteer to work extra time from all available qualified staff who are working at the time of the unforeseeable emergent circumstance;

2. Contact all qualified employees who have made themselves available to work extra time;

3. Seek the use of qualified per diem staff; and

4. Seek qualified personnel from a contracted temporary agency when such staff is permitted by law, regulation or applicable collective bargaining agreements.

“Unforeseeable emergent circumstance” means an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery that requires immediate action.

8:43E-8.4 Purpose

The rules in this subchapter are intended to promote the health, safety, and welfare of patients, residents and clients of health care facilities as well as of certain hourly wage employees of those facilities through establishing rules implementing the statutory limitations on health care facilities’ authority to require certain hourly wage employees, involved in direct patient care activities or clinical services, to work overtime.

8:43E-8.5 Overtime procedures

(a) Except as provided for in (b) below, an employer shall not require an employee involved in direct patient care activities or clinical services to work in excess of an agreed to, predetermined and regularly scheduled daily work shift, not to exceed 40 hours per week. The acceptance by any employee of work in excess of this shall be strictly voluntary. The refusal of an employee to accept such overtime

work shall not be grounds for discrimination, dismissal, discharge, or any other penalty or employment decision adverse to the employee.

(b) The requirements of (a) above shall not apply in the case of an unforeseeable emergent circumstance when:

1. The overtime is required only as a last resort, and is not used to fill vacancies resulting from chronic short staffing; and

2. The employer has exhausted reasonable efforts to obtain staffing.
However, exhaustion of reasonable efforts shall not be required in the event of any declared national, State or municipal emergency or a disaster or other catastrophic event which substantially affects or increases the need for health care services or causes the facility to activate its emergency or disaster plan.

(c) In the event that an employer requires an employee to work overtime pursuant to (b) above, the employer shall provide the employee with necessary time, up to a maximum of one hour and which may be taken on or off the facility's premises, to arrange for the care of the employee's minor children, or elderly or disabled family members.

(d) On-call time shall not be construed to permit an employer to use on-call time as a substitute for mandatory overtime.

8:43E-8.6 Records; dissemination of information

(a) An employer shall establish a system for keeping records of circumstances where employees are required to work in excess of an agreed to,

predetermined and regularly scheduled daily work shift, or in excess of 40 hours per week. The records shall include, but not be limited to:

1. The employee's name and job title;

2. The name of the employee's work area or unit;

3. The date the overtime was worked, including start time;

4. The number of hours of overtime mandated;

5. The employee's daily work schedule for any week in which the employee is required to work excess time;

6. The reason why the overtime was necessary;

7. A description of the reasonable efforts that were exhausted prior to requiring overtime. This shall include:

i. The names of employees contacted to work voluntary overtime;

ii. A description of efforts to secure per diem staff; and

iii. A list of the temporary agencies contacted; and

8. The signature of individual authorizing the required mandatory overtime.

(b) An employer shall provide the employee with a copy of the documentation in accordance with the requirements set forth in (a) above upon requiring that the employee work overtime, except that the total number, rather than the names, of employees contacted in accordance with (a)7i above shall be provided.

(c) Records as set forth in (a) above shall be kept a period of two years.

(d) A facility shall post in a conspicuous place a notice prepared by the New Jersey Department of Labor concerning New Jersey Mandatory Overtime Restrictions for Health Care Facilities (N.J.S.A. 34:11-56a et seq.)

8:43E-8.7 Enforcement and administrative penalties

(a) If the Commissioner of Labor determines that a facility has violated provisions of this subchapter, the Commissioner of Labor may issue sanctions in accordance with the Wage and Hour regulations contained at N.J.A.C. 12:56.

(b) In cases where the State agency that licenses the facility and/or Department of Labor requests additional information from a facility concerning mandatory overtime usage, the facility shall comply with this request within 10 working days. The State agency that requested the information from the facility may, at its discretion, grant an extension to this timeframe if the facility can demonstrate good cause. Failure to provide these records shall result in the issuance of administrative penalties in accordance with N.J.A.C. 12:56-1.2 and 8:43E-3.4(a)13.

(c) If the State agency that licenses a facility subject to this chapter determines through a survey or complaint investigation that the facility exhibits a pattern or practice of noncompliance with N.J.A.C. 8:43E-8.5, that State agency shall notify the Department of Labor of the violation. The Department of Labor may also share with State agencies that license facilities subject to this chapter any information it develops on Statewide and facility-specific trends, such as number of mandatory overtime complaints filed; the number of complaints found to be valid; the number of enforcement actions appealed; and the number of enforcement actions upheld.

(d) In the event a facility licensed by the Department fails to develop and implement the required recordkeeping in accordance with N.J.A.C. 8:43E-8.6 and the required policies and procedures in accordance with this section, the Department shall take enforcement action in accordance with the provisions of N.J.A.C. 8:43E-3.4(a)13.

(e) Nothing in this subchapter shall be construed to relieve a facility of its obligation to comply with State licensure standards pertaining to minimum employee staffing levels.

8:43E-8.8 Policies and procedures

(a) A facility shall develop, revise as necessary and implement policies and procedures for the purpose of training and educating staff on mandatory overtime. The policies and procedures shall include mandatory educational programs that address at least the following:

1. The conditions under which an employer can require mandatory overtime;
2. Overtime procedures;
3. Employee rights; and
4. Complaint procedures.

(b) A facility shall establish a staffing plan designed to facilitate compliance with the requirements of this subchapter.

1. The staffing plan shall include procedures to provide for replacement staff in the event of sickness, vacations, vacancies and other employee absences.

(c) Upon request, the staffing plan and all related policies and procedures shall be made available to the Department of Labor and/or the State agency that licenses the facility.

8:43E-8.9 Discharge or discrimination against an employee making a complaint.

An employer shall not discharge or in any other manner discriminate against an employee because such employee has made any complaint to his or her employer, including the employer's representative; to the Commissioner of Labor; or to the State agency that licenses the facility where the employee works that the employee has been required to work overtime in contravention to the provisions of this chapter.

8:43E-8.10 Complaint system

(a) An employee covered by this subchapter shall have a right to file a complaint up to two years following the date of the assigned mandatory overtime if he or she believes the overtime was not in response to an unforeseen emergent circumstance, and/or was used to compensate for chronic short staffing, and/or required reasonable efforts were not exhausted, and/or he or she was not provided the allowed time to make arrangements for the care of family members. All such complaints shall be submitted to:

Labor Standards and Safety Enforcement Directorate

Division of Wage and Hour Compliance of the Department of Labor

PO Box 3891

Trenton, New Jersey 08625-0389

1. The complaint form shall be submitted on the form entitled "TBD,"

available from the New Jersey Department of Labor at:

www.state.nj.us/labor/wc/forms/tbd.

2. If requested, records of such reports shall be made available upon request to the Department or to the Department of Law and Public Safety or to the Department of Human Services.

8:43E-8.11 Protection of the right to collective bargaining

Nothing in this subchapter shall be construed to impair or negate any employer-employee collective bargaining agreement or any other employer/employee contract in effect as of January 1, 2003 for licensed general hospitals and July 1, 2003 for all other facilities subject to these rules as set forth at N.J.A.C. 8:43E-8.1.

8:43E-8.12 Data

A facility shall submit data related to the effects of prohibiting mandatory overtime in accordance with this chapter as well as data required to determine whether chronic staffing shortages exist, as the State agency which licenses the facility shall request from time to time directly from each facility.